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The Fate of ERISA-Qualified Pension Plans Under the Federal Bankruptcy Code [In re Graham, 726 F.2d 1268 (8th Cir. 1984)]

THE FATE OF ERISA-QUALIFIED PENSION PLANS UNDER THE FEDERAL BANKRUPTCY CODE

[In re *Graham,* 726 F.2d 1268 (8th Cir. 1984)].

INTRODUCTION

Pension plan benefits are an increasingly prominent source of retirement savings for millions of American employees.[1] It is hardly astonishing, then, that bankruptcy debtors and trustees often argue over these extensive assets.[2] Litigation concerning debtors' attempts

1. *See* Hage & Oslund, *Pension funds: Secure futures or big risks?,* Minneapolis Star & Trib., Jan. 20, 1985, at 1D, col. 1. The increase in the importance of pension funds began after World War II and was enhanced by the enactment of ERISA. *See infra* note 3 and accompanying text. Today, the private pension fund system in the United States has assets of almost one trillion dollars. Pension funds cover over 50 million American workers and provide 37% of United States retirement income. Experts estimate that by the end of the century, private pension plans will cover 70% of all retirees. Hage & Oslund, *supra.*

2. *See* Weintraub & Resnick, *From the Bankruptcy Courts:* In re Goff—*Keogh Plans and IRAs as Property of the Bankruptcy Estate,* 16 U.C.C. L.J. 264 (1984). A great deal of litigation in the bankruptcy courts involves the issue of whether pension fund proceeds should pass to the bankruptcy trustee or should be exempt or excluded and, therefore, kept out of the bankruptcy estate. *See, e.g.,* Miller v. Jones (*In re* Jones), 43 Bankr. 1002 (N.D. Ind. 1984) (ERISA plan not a spendthrift trust and thus included in bankruptcy estate); SSA Baltimore Fed. Credit Union v. Bizon, 42 Bankr. 338 (D. Md. 1984) (civil service retirement benefits due to debtor not part of bankruptcy estate); Central States, S.E. & S.W. Areas Health & Welfare Pension Fund v. Stephenson (*In re* McLean), 41 Bankr. 893 (D.S.C. 1984) (despite anti-alienation clauses, ERISA plan was not spendthrift trust and, therefore, was included in bankruptcy estate); Hovis v. Wright (*In re* Wright), 39 Bankr. 623 (D.S.C. 1983) (debtor's contributions to state retirement system were property of estate under Bankruptcy Code); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 24 Bankr. 927 (D. Kan. 1982) (beneficial interest in an ERISA-qualified plan excluded from bankruptcy estate); Rodgers v. Norman (*In re* Crenshaw), 44 Bankr. 30 (Bankr. N.D. Ala. 1984) (debtor's vested interest in ERISA-qualified profit-sharing plan property of estate); Miller v. Lincoln Nat'l Bank & Trust Co. (*In re* Cook), 43 Bankr. 996 (Bankr. N.D. Ind. 1984) (ERISA-qualified plan was part of bankruptcy estate); Bezanson v. Maine Nat'l Bank (*In re* Kwaak), 42 Bankr. 599 (Bankr. D. Me. 1984) (pension plan analogous to spendthrift trust and, therefore, excluded); American Nat'l Bank v. Huff (*In re* Huff), 42 Bankr. 553 (Bankr. N.D. Ill. 1984) (non-assignability provisions did not exclude deferred compensation plan from bankruptcy estate); Liscinski v. Mosley (*In re* Mosley), 42 Bankr. 181 (Bankr. D.N.J. 1984) (ERISA-qualified plan excluded because not attached by creditor or bankruptcy trustee); *In re* La Fata, 41 Bankr. 842 (Bankr E.D. Mich. 1984) (funds from ERISA-qualified plans were property of bankruptcy estate); *In re* Peeler, 37 Bankr. 517 (Bankr. M.D. Tenn. 1984) (funds from deferred compensation plan not beyond debtor's control when bankruptcy petition was filed were included in bankruptcy estate); *In re* Berndt, 34 Bankr. 515 (Bankr. N.D. Ind. 1983) (savings portion of ERISA plan not excluded where debtor had present right to reach

to keep pension plan funds qualifying under the Employee Retirement Income Security Act of 1974 (ERISA)[3] out of the bankruptcy estate has been increasing.[4] This trend will undoubtedly continue as

it); Warren v. G.M. Scott & Sons (*In re* Phillips), 34 Bankr. 543 (Bankr. S.D. Ohio 1983) (interest in profit-sharing pension plan not included where anti-alienation language precluded access by general creditors); *In re* Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983) (although pension plan payments were not currently needed for debtor's support, they could be claimed as exempt in light of debtor's impending retirement needs); Shults v. Rose's Stores, Inc. (*In re* Holt), 32 Bankr. 767 (Bankr. E.D. Tenn. 1983) (funds contributed toward pension fund excluded from estate).

3. Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified at 29 U.S.C. §§ 1001-1144 and scattered sections of the Internal Revenue Code). Pension and profit-sharing plans come in many varieties, but almost all of them meet ERISA-qualifying requirements. Although a wide range of styles exist, plans can be grouped for the purposes of this Comment into four general categories. The first category is the traditional defined-benefit pension plan, which provides for a guaranteed benefit after retirement, and is usually connected to some portion or percentage of the worker's salary. *See* Hage & Oslund, *supra* note 1, at 1D, cols. 1-2. The second category is the defined-contribution plan which simply operates to provide certain contributions to a special retirement account during the employee's stay with the employer. *See id.* at 3D, col. 1 (detailed comparison of defined-benefit and defined-contribution plans). The third category of retirement fund, the Keogh plan, is limited to use by self-employed persons and, therefore, is usually controlled and administered by the self-employed individual. *See* Pulles, *ERISA Plans in Bankruptcy*, HENNEPIN LAW., Sept.-Oct. 1984, at 19, 21 nn.1-3. Keogh plans are established pursuant to the Keogh-Smathers Act, Pub. L. No. 87-792, 76 Stat. 809 (1962) (codified in scattered sections of the Internal Revenue Code). For a detailed discussion of Keogh plans, see Rayndon & Anderson, *Attachment of Keogh Plan Assets—A Confusion in the Law and the Courts*, 61 TAXES 525 (1983); *see also Self Employed Retirement Plans*, FED. TAX COORDINATOR 2D (IRA) § H8000. Finally, there are individual retirement accounts (IRAs). IRAs are available to all individuals including those already participating in other ERISA-qualified plans, and are in widespread use. For a more detailed discussion of IRAs, see *Individual Retirement Arrangements*, 355 TAX MGMT. (BNA) A-1. For a general discussion of ERISA-regulated pension plans, see Soble, Eggertsen & Bernstein, *Pension-Related Claims in Bankruptcy*, 56 AM. BANKR. L.J. 155 (1982). For a detailed analysis of pension plan qualification and tax consequences, see generally *Employee Plans—Reporting and Disclosure Requirements*, 361 TAX. MGMT. (BNA) A-1; *(ERISA)-Qualified Plans—Deductions, Contributions and Funding*, 313 TAX. MGMT. (BNA) A-1; *Pension Plans—Qualifications*, 351 TAX. MGMT. (BNA) A-1.

4. Weintraub & Resnick, *supra* note 2, at 264. "[T]he volume of litigation over a debtor's right to keep an ERISA pension plan despite the filing of a liquidation petition appears to be increasing at a rapid rate and is likely to continue to increase in the future as these pension funds grow." *Id.* When ERISA was enacted it was generally recognized that the legislation would give rise to a substantial amount of litigation. Cook, *Current Developments in Litigation Under ERISA*, PENSIONS AND EMPLOYEE BENEFITS—ANNUAL REVIEW 2D 1 (1980). Cook stated in his article that:

> one of the fundamental goals of ERISA was to facilitate individual access to the federal courts for the vindication of rights under employee plans and to provide a mechanism for the Department of Labor to initiate litigation to protect the rights of participants and beneficiaries. Now, as the fifth anniversary of ERISA has passed, it comes as no surprise that the anticipated wave of litigation is a reality.

Id. One reason for the recent growth in pension plan-bankruptcy litigation may be pension plans remain attractive to both employers and employees.[5]

Despite the fact that a bankruptcy estate includes all of a debtor's property,[6] debtors argue that their interests in ERISA pension funds should be excluded from the bankruptcy estate. In re *Graham,*[7] a recent Eighth Circuit Court of Appeals decision, involved such an argument. The *Graham* court held that such clauses restricting the assignment or alienation of fund proceeds, required for ERISA plans, do not keep the fund assets from becoming part of the bankruptcy estate.[8] Thus, a debtor's interest in an ERISA-qualified plan was held to be part of the bankruptcy estate that would eventually be distributed among his or her creditors.[9]

The significance of *Graham* stems from the Eighth Circuit's decision that bankruptcy law controls the status of pension funds for which ERISA provides a seemingly clear exemption. The court refused to accept the debtor's argument that pension fund proceeds are exempt from the bankruptcy estate because they are restricted from assignment and alienation under ERISA,[10] and are thus en-

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that there was a short time-lag involved after the enactment of ERISA in 1974 and the new Bankruptcy Reform Act of 1978, in addition to the new manner of determining the bankruptcy estate under the Bankruptcy Code. The new Act became effective on October 1, 1979, and as a result, the past several years have seen the beginning of a trend toward more litigation in this area. *See supra* note 2 and accompanying text.

5. A factor contributing to the continued importance of these types of pension plans is the tax advantage afforded to both employees and employers through participation in a qualified plan. Pension plans are attractive devices for compensating employees for their services because of the tremendous tax breaks. The tax advantages alone are usually sufficient incentive for an employer to establish a pension plan. Contributions to a qualified plan are deductible from the employer's gross income. I.R.C. § 404 (1982). The employee, however, will not have any recognizable taxable income until the benefits of the plan are actually received. *Id.,* subd. (a). In addition, any interest earned on the contributed funds accumulates tax free. *Id.* § 501(a); *see supra* note 3 and accompanying text. The tax consequences of pension plans, including defined-benefit, defined-contribution, Keogh plans, and IRAs were affected by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982) (codified in scattered sections of the Internal Revenue Code). For a detailed discussion of the tax consequences for pension plans under these acts, see Pingree & Goulding, *Pension Provisions of the Tax Equity and Fiscal Responsibility Act of 1982,* 60 TAXES 795 (1982).

6. *See* 11 U.S.C. § 541(a) (1982). The Code defines the bankruptcy estate as the equitable estate created and held by the bankruptcy trustee at the commencement of bankruptcy proceedings for future distribution among creditors.

7. 726 F.2d 1268 (8th Cir. 1984).

8. *Id.* at 1273.

9. *Id.*

10. In *Graham,* the debtor's pension plan was ERISA-qualified. *Id.* at 1269. In order to be qualified under ERISA, the pension plan must contain restrictive anti-alienation and anti-assignment language. *See* 29 U.S.C. § 1056(d)(1); *see also infra* note 75 and accompanying text.

forceable against creditors under nonbankruptcy law.[11] This holding appears to be contrary to the facial language of the Bankruptcy Code.[12] The court also rejected the debtor's alternative argument that his interest in the fund should not be included in the bankruptcy estate since it was property which is specifically exempted under federal law.[13] The court's rejection of these arguments parallels similar decisions made in other federal courts throughout the country.[14]

The *Graham* decision does not reflect the basic intent and purpose of the bankruptcy laws.[15] Under *Graham,* debtors may be left with the unenviable task of beginning to save for their retirement all over again. Particularly for the self-employed, this task may be difficult if not impossible.[16]

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11. 11 U.S.C. § 541(c)(2). That provision states, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." *Id.* The *Graham* court held that this language was applicable only to preserve the status of spendthrift trusts under state law. *See Graham,* 726 F.2d at 1271; *see also infra* notes 82-87 and accompanying text.

12. One commentator suggests that the *Graham* court erred in not construing the statute on its face. The *Graham* court instead resorted to the legislative history in analyzing the Bankruptcy Code. *See* Pulles, *supra* note 3, at 19.

> [U]nder non-bankruptcy law debtors can shield a substantial amount of money in ERISA qualified plans. Thus, many courts have engineered an ambiguity in the words 'applicable non-bankruptcy law,' enabling them to resort to legislative history. The legislative history indicates that, by the use of the phrase 'applicable non-bankruptcy law', Congress intended to keep only traditional spendthrift trusts out of bankruptcy, not all ERISA-qualified plans. A substantial portion of ERISA-qualified plans, including all Keogh and IRA plans, will not constitute valid spendthrift trusts under traditional state spendthrift trust law . . . . Through this recourse to the legislative history many bankruptcy and district courts have found happiness in snaring many ERISA-qualified plan assets for the bankruptcy estate. In doing so they have done an injustice to the plain meaning of the statute and to the Congressional intent behind ERISA.

Id. (footnotes omitted); *see infra* note 128.

13. *See* 726 F.2d at 1273-74; 11 U.S.C. § 522(b)(2)(A) (allowing an individual debtor to exempt from the estate "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of filing of the petition").

14. *See, e.g., In re* Clark, 711 F.2d 21 (3d Cir. 1983) (Keogh plan assumed to be part of the estate); *In re* Goff, 706 F.2d 574 (5th Cir. 1983) (ERISA-qualified Keogh plan benefits not exempt); *Shackelford,* 27 Bankr. 372 (IRA was property of the estate); *Strasma,* 26 Bankr. 449 (Keogh plan part of estate assets); *Lowe,* 25 Bankr. 86 (retirement annuity included in assets of estate); *Klayer,* 20 Bankr. 270 (beneficial interest in retirement trust not exempt asset); *Watson,* 13 Bankr. 391 (interest in ERISA-qualified cooperative investment plan not insulated from bankruptcy trustee).

15. One of the basic purposes of the bankruptcy statutes is to provide the debtor with a fresh start in life without debt. *See infra* note 19.

16. *See* B. WEINTRAUB & A. RESNIK, BANKRUPTCY LAW MANUAL § 4.03[8] (Supp. II 1984). Although courts do take various factors into account when assessing the needs of the debtor for purposes of a fresh start, *see, e.g., In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981) (under Code's exemption provisions for pension funds,

This Comment discusses *Graham* and the reasoning relied upon by the Eighth Circuit in allowing ERISA-qualified pension plans to become part of the bankruptcy estate. First, the Comment examines the history of the prior Bankruptcy Act[17] and the new Bankruptcy Code.[18] Second, it reviews decisions by bankruptcy and federal courts which have failed to exempt ERISA-qualified pension funds from the bankruptcy estate, particularly the Eighth Circuit's reasoning in *Graham.* Finally, the Comment focuses attention on *Graham's* effects on future bankruptcy cases, and examines the anomaly of the court's resort to legislative interpretation when confronted with a facially clear statute.

I. From the Act to the Code: Bankruptcy Law History

The primary purposes and general rules of the bankruptcy laws have remained basically unchanged since the enactment of the country's first comprehensive national bankruptcy statute, the National Bankruptcy Act of 1898.[19] Important procedural changes, however,

special need for retired, infirm, or elderly debtors should be considered), in most instances funds which the debtor has worked hard to save for his or her old age will pass to the estate. *See, e.g., In re* Kochell, 31 Bankr. 139 (Bankr. W.D. Wisc.), *aff'd,* 732 F.2d 564 (7th Cir. 1982) (factors used to determine the extent to which retirement plan is reasonably necessary for the support of the debtor include age, health, future earnings, and necessary expenditures). In *Kochell,* the debtor was a middle-aged doctor who had made contributions to his pension plans for five years. The court held that it was impossible to consider that the pension funds could be deemed necessary for the support of the debtor. *Id.* at 141.

17. *See infra* note 22.

18. *See infra* note 20.

19. 30 Stat. 544 (1898). The Act, with periodic changes, governed bankruptcy law for approximately 80 years and is still significant. It remains the law for cases commencing before September 30, 1979, and many precedents set under the Act remain influential under the Code. The Act was repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. § 101-1501). For a brief history of the development of bankruptcy laws in the United States, see 1 W. Norton Jr., Norton Bankruptcy Law and Practice §§ 1.01-.03 (1981).

An intrinsic purpose of bankruptcy law is to give the debtor a chance at a fresh start in life without creditor harassment. *See* Perez v. Campbell, 402 U.S. 637, 648 (1971) (basic purpose of the bankruptcy laws is to give certain debtors a fresh start). Bankruptcy laws are no longer used primarily to punish insolvents who may have made some mistakes. *See* Beall v. Pinckney, 150 F.2d 467, 470 (5th Cir. 1945). Instead, the laws are intended to release and rehabilitate the debtor and allow him or her to start anew. *Id.* Public policy looks beyond the debtor to his or her family, and regards reasonable protection of that family as a greater concern than the full payment of debts. *Id.* In keeping with these policy considerations, certain property of the debtor can be treated as exempt. *See* 11 U.S.C. § 522 (1982). The goals of the exemption provisions are: (1) to protect the debtor from abject poverty, (2) to assist and encourage the debtor on the road to recovery through a fresh start, and (3) to shift the burden of the welfare of the debtor and his or her family from society as a have been made in recent years. The Bankruptcy Reform Act of 1978[20] represents a thorough revision and reform of bankruptcy law, practice, and procedure, and is the first major revision of the bankruptcy laws in the last forty years.[21]

A. *The Former Law: Transferability and Leviability*

Under the Bankruptcy Act of 1898, the property of a bankruptcy estate was defined in terms of its transferability or leviability.[22]

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whole to the creditors who dealt with the debtor and contributed to his economic demise. *In re* Merwin, 4 BANKR. CT. DEC. (CRR) 17, 18 (Bankr. M.D. Fla. 1978).

20. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1501). On November 6, 1978, President Carter signed into law HR 8200, unofficially known as the Bankruptcy Reform Act of 1978. The Act became effective on October 1, 1979 and is divided into four titles. The most important of these is Title I, which contains the Bankruptcy Code. That title contains the substantive and procedural law for bankruptcy liquidation and rehabilitation cases, although much of the procedural material is actually contained in the bankruptcy rules. For detailed information tracing the development of the Bankruptcy Reform Act, see Forman, *The Bankruptcy Reform Act*, PA. B. ASS'N Q., July 1979, at 168; W. NORTON, *supra* note 19, §§ 3.01-.05. For an overview of the changes which the new statute created in bankruptcy law, see Patrick & Meyer, *An Overview of the Bankruptcy Reform Act of 1978*, 1 Bankr. 1 (1980).

21. *See* Forman, *supra* note 20, at 168. The Bankruptcy Reform Act of 1978 is the first major change in United States bankruptcy law since the Chandler Act of 1938. One commentator has suggested that the change was long overdue:

> The need for revision and reform developed over a number of years. The reasons included: the rising tide of consumer bankruptcies after World War II, which placed a severe strain on the current bankruptcy system; an increase in the costs of operation of the bankruptcy system particularly in nonbusiness cases, which produced little or no benefit to creditors; a growing awareness that the adversary process is inappropriate for this kind of nonbusiness proceeding; and a singular lack of uniformity in the application of the bankruptcy laws throughout the country. In addition the promulgation of the rules of bankruptcy procedure, although a significant advance, created confusion with respect to the remaining substantive provisions of the statute unaffected by the rules. The substantive law and the court system both needed updating to meet the demands of the larger and more complicated business cases. Substantial changes in the law in other fields occurred and deficiencies in the reorganization Chapters surfaced, all of which were hampering the efficient operation of the rehabilitation process and called for modernization.

Id.

22. 11 U.S.C. § 110(a)(5) (1976). Section 70(a)(5) of the Bankruptcy Act included "property, including rights of action which prior to the filing of the petition [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered." Under the old Act, any property held by the debtor in trust belonged to the beneficiary and never became a part of the bankruptcy estate under § 70. *See In re* Wyatt, 6 Bankr. 947, 952 (Bankr. E.D.N.Y. 1980); *see also In re* Franklin Sav. & Loan Co., 34 F. Supp. 661 (E.D. Tenn. 1940); 4A L. KING, COLLIER ON BANKRUPTCY § 70.25(2) (14th ed. 1978) [hereinafter cited as COLLIER]. However, under the new Bankruptcy Code, the initiation of a "bankruptcy case creates an estate which, pursuant to § 541(a)(1) consists of 'all legal or equitable interests of the debtor in the property.'" *See Wyatt*, 6 Bankr. at 953 (quoting 11 U.S.C. § 541(a)(1)).

Utilizing this standard, a debtor's beneficial interest in a trust or similar future interest was excluded from the bankruptcy estate at the outset of the proceedings if it could not be transferred or levied upon under the laws of the debtor's state of domicile.[23]

Section 70(a) of the Act[24] applied a two-prong test to determine the status of exempt property. First, the court was to inquire whether the property could have been transferred by the bankrupt on the date of the filing of the bankruptcy petition.[25] Second, the court was to consider whether the property could have been levied upon and sold through judicial process or otherwise seized, impounded, or sequestered.[26] If either of these conditions were satisfied, the property was not exempt and could pass to the bankruptcy estate.[27]

Under this transferability-leviability standard,[28] state law was generally controlling.[29] Retirement benefits authorized under federal

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23. Eaton v. Boston Safe Deposit & Trust Co., 240 U.S. 427 (1916) (trust fund established by will did not pass to trustee because general creditors could not reach it under Massachusetts law); Stokes v. Trust Co. (*In re* McLaughlin), 507 F.2d 177 (5th Cir. 1975) (rights received by debtor pursuant to a support trust created by father's will did not pass to bankruptcy trustee because such rights were not subject to transfer or levy under Georgia law); Stebbins v. Crocker Citizens Nat'l Bank (*In re* Ahlswede), 516 F.2d 784 (9th Cir. 1975) (bankrupt's interest in a spendthrift trust was exempt from estate to extent recognized by California law).

24. 11 U.S.C. § 110(a) (repealed 1978).

25. *See* 4A COLLIER, *supra* note 22, § 70.15(2).

26. *Id.* This two-prong test "is simple and easily applied." Gillaspy v. International Harvester Co. of Am., 109 Miss. 136, 67 So. 904 (1915). Section 70(a)(5) "covers 'any interest in the property the bankrupt may have had, however minute, that was subject to transfer by him or levy and sale by judicial process' or other seizure or sequestration." 4A COLLIER, *supra* note 22, § 70.15(2), at 143.

27. 4A COLLIER, *supra* note 22, § 70.15(2), at 137. Generally, it is not necessary that both prongs of the test be satisfied in order for the debtor's property to pass to the bankruptcy estate. Thus, if the property at issue is transferable, it is not mandatory that it also be subject to levy or sale. *See, e.g.*, Patrick v. Beatty, 202 N.C. 454, 460, 163 S.E. 572, 575 (1932) (if property could have been transferred, it is immaterial whether or not it could have been levied upon and sold under judicial process). Naturally, the converse is also true that if the property is subject to levy or sale, but is not necessarily transferable, it also lapses to the bankruptcy estate. *See Gillaspy*, 109 Miss. 136, 67 So. 904.

28. *See supra* notes 22-27 and accompanying text.

29. 4A COLLIER, *supra* note 22, § 70.22(2), at 298. Pensions payable to state or municipal officers or employees on retirement are usually deemed to be rewards for public service rather than property rights, and when not leviable or transferable they do not pass to the bankruptcy estate. *Id.* at 298-99. *But see* Ferwerda v. Zievers (*In re* Ferwerda), 424 F.2d 1131, 1133 (7th Cir. 1970), in which the debtor, a physician, argued that assets deposited by him in an American Medical Association (AMA) retirement fund were exempt under provisions of Wisconsin law which provided an exemption for assets in an employee's trust. The court held that the doctor was not an "employee" pursuant to the Wisconsin statute and denied the exemption. This holding was in spite of the fact that the AMA plan had been established pursuant to

law, however, were occasionally rendered immune from the bankruptcy estate by federal statutes or regulations which preempted state provisions.[30] Under section 70(a)(5),[31] all property specified in that section which was not exempt passed to the trustee as a matter of law.[32] Nevertheless, in interpreting the scope of the exemption under section 70(a), the courts found it nearly impossible to categorically define "property" for exemption purposes.[33]

The United States Supreme Court ruled that the scope of the term "property" under section 70(a) was to be determined with reference to the distinctive purposes of the Act.[34] The Supreme Court held that courts must look to the policies of the bankruptcy laws to determine on an ad hoc basis whether the bankrupt's property interest should pass to the estate.[35]

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the Keogh-Smathers Act, *see supra* note 3, which allowed self-employed individuals to be treated as "employees." *Ferwerda,* 424 F.2d at 1133.

30. *See* Tennessee Valley Auth. v. Kinzer, 142 F.2d 833 (6th Cir. 1944) (sustaining federal regulations governing the TVA Retirement System against trustee's claim that debtor's interest was vulnerable under state law as a spendthrift trust created by the debtor). *But see Ferwerda,* 424 F.2d at 1133 (court disallowed federal definition of employee in favor of state law interpretation).

31. Under § 70(a) of the old Act, exempt property constituted a separate class of property from that which passed to the bankruptcy trustee. The exempt property did not expressly pass to the estate under this section. Section 70 also provided that the trustee of the estate would be vested with title to all the bankrupt's property except that which had been adjudicated exempt. 4 L. KING, COLLIER ON BANKRUPTCY § 541.02[3] (15th ed. 1984) [hereinafter cited as COLLIER ON BANKRUPTCY]; *see infra* note 46.

32. 11 U.S.C. § 24 (1976). Under § 6 of the Bankruptcy Act, exemptions specified by state law are preserved in bankruptcy for the benefit of residents of the respective states. In applying these exemptions, courts are bound to follow the decisions of the state courts. *See, e.g.,* Judson v. Witlin (*In re* Witlin), 640 F.2d 661 (5th Cir. 1981) (where no other provision is contained in a federal statute dealing with exemptions, state law governs under § 6 of the Bankruptcy Act).

33. *See, e.g.,* Segal v. Rochelle, 382 U.S. 375, 379 (1966). "[I]n interpreting [§ 70(a)(5)], '[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others.' " *Id.* (quoting Fisher v. Cushman, 103 F. 860, 864 (1st Cir. 1900)).

34. *Id.; see also* Kokoszka v. Belford, 417 U.S. 642 (1974) (income tax refund is property of the estate under § 70(a)(5) because it is sufficiently rooted in the bankruptcy past and not conceptually related to future wages necessary for debtor's fresh start). *But see* Lines v. Frederick, 400 U.S. 18 (1970) (accrued but unpaid vacation pay was not property of estate where the purpose of the Bankruptcy Act is to give debtor a new purpose in life and a clear field for future effort); *see also infra* note 46.

35. *See Segal,* 382 U.S. at 379; *see also* 4 COLLIER ON BANKRUPTCY, *supra* note 31, § 541.02[1]. In analyzing *Segal,* it has been stated that:

> while future wages or expected bequests might be transferable under nonbankruptcy law, they would nonetheless not be called property within the meaning of the [old] Bankruptcy Act. The reason given [by the *Segal* court] was that to allow the trustee to take them would defeat the fresh start policy embodied, in part, in the bankruptcy discharge.

The primary objective of section 70(a)(5) was "to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition."[36] In recognition of the conflicting fresh start doctrine,[37] however, a third prong was added to the two-part test of section 70(a). Once the transferability-leviability test had been satisfied, the property would pass to the bankruptcy estate only if the purposes of the bankruptcy laws were served by including that property within the estate.[38]

In order to narrow this difficult rule, the Supreme Court, in *Segal v. Rochelle,*[39] ruled that a disputed property interest was to be considered the property of the estate if it was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start."[40] Despite this attempted standardization, courts continue to disagree on cases with seemingly similar fact situations.[41]

B. *The New Code: The All-inclusive Standard*

The enactment of the Bankruptcy Reform Act of 1978[42] and the establishment of the Bankruptcy Code[43] have provided significant procedural changes for exempt property that have affected the manner in which courts decide bankruptcy cases.[44] The most prominent

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Id.

36. *Segal,* 382 U.S. at 379. The court went on to declare:

> To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. However, limitations on the term do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future.

Id. at 541-42 (citations omitted).

37. *See supra* note 19.

38. *See* Weintraub & Resnick, *supra* note 2, at 265.

39. 382 U.S. 375 (1966).

40. *Id.* at 380. Along these lines, the Supreme Court reasoned that future interests, which were designed to function as a wage substitute after retirement and were primarily to support the basic requirements of life for the debtor and his or her family, would not pass to the estate. *Kokoszka,* 417 U.S. at 648.

41. *Compare* Turpin v. Wente (*In re* Turpin), 644 F.2d 472, 474 (5th Cir. 1981) (debtor's interest in two trusts provided for retirement purposes did not pass to the estate) *and In re* Nunnally, 506 F.2d 1024 (5th Cir. 1975) (trustee had no claim to retirement benefits of the debtor) *and* Mason v. Eastman Kodak Co. (*In re* Parker), 473 F. Supp. 746 (W.D.N.Y. 1979) (contributions to ERISA-qualified plan not property of the estate) *with In re* Baviello, 12 Bankr. 412 (Bankr. E.D.N.Y. 1981) (anti-alienation clauses of ERISA fund did not preclude passage of funds to estate).

42. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1501); *see supra* notes 20-21 and accompanying text.

43. This refers to Title I of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1501; *see supra* note 20.

44. *See supra* note 22; *see also* 4 COLLIER ON BANKRUPTCY, *supra* note 31,

change under the Code is the manner in which property of a debtor is transferred to the bankruptcy estate. Under the Code, all property of the debtor vests immediately in the estate upon the filing of the bankruptcy petition.[45] This change from the Bankruptcy Act is significant.[46]

Once a debtor's property vests in the estate, the debtor is permitted to claim certain exemptions under section 522.[47] This is a substantial change from section 70 of the Bankruptcy Act, in which exempt items constituted a separate and distinct class of property which never passed to the estate.[48] Under the Code, the debtor has the option of electing to take the federal bankruptcy exemptions or the exemptions provided under federal or state nonbankruptcy law.[49]

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§ 541.02[1]. Under § 541 of the Bankruptcy Code, nonbankruptcy law determines whether the debtor has any legal or equitable interest in the property which he is seeking to exempt. *Id.* at 541-10 to 541-11. Unlike § 70(a)(5) of the Bankruptcy Act, it is no longer necessary to determine whether nonbankruptcy law permits the debtor to transfer his or her property or whether his or her creditors may reach it. *Id.* at 541-11. Although the debtor's interest in an item will be determined by nonbankruptcy law, the question of what constitutes property within the meaning of § 541 apparently remains a federal question. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 367-69 (1977); *see also In re* Cox Cotton Co., 3 COLLIER BANKR. CAS. 2D (MB) 615, 623 (Bankr. E.D. Ark. 1980), *aff'd*, 647 F.2d 768 (8th Cir. 1981) (while the interest of the debtor in property is determined by state law, the question of whether such property is part of the estate is a federal question).

45. 11 U.S.C. § 541(a)(1). One court, quoting the House Report, stated:

> The sweeping scope of this automatic inclusion was intended to remedy much of the old Act's perceived deficiencies: '[The Act was] a complicated melange of references to state law, and [did] little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts.'

Goff v. Taylor (*In re* Goff), 706 F.2d 574, 578 (5th Cir. 1983) (quoting H.R. REP. No. 595, 95th Cong., 2d Sess. 175 (1977)).

46. Explaining the broadened scope of § 541 of the new Code over § 70(a) of the old Act, Senate Report 989 stated that the new law "has the effect of overruling *Lockwood v. Exchange Bank,* 190 U.S. 294 (1903) because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it . . . ." S. REP. No. 989, 95th Cong., 2d Sess. 82 (1977); *see* Regan v. Ross, 691 F.2d 81, 83-84 (2d Cir. 1982) (the substantial departure of § 541 from the old Act reflects a congressional intent to include all property of the debtor, even that needed for a fresh start). The Report concluded that § 4 overrules Lines v. Frederick, 400 U.S. 18 (1970). S. REP. No. 989, 95th Cong., 2d Sess. 82 (1977); *see supra* note 34.

47. *See* 11 U.S.C. §§ 522(b), (d) (1982).

48. *See* 11 U.S.C. § 110(a) (1976).

49. 11 U.S.C. § 522(b) (1982); *see In re* Meyers, 2 Bankr. 603 (Bankr. E.D. Mich. 1980). The *Meyers* court observed the difference between the old and the new law:

> Under pre-Code law, a bankrupt was able to claim as exempt, property which was allowable as exempt by federal law or by state law. § 6 of the Bankruptcy Act. . . . The Code takes a different approach. It contains its own exemption provisions, (§ 522(d)) but gives the debtor the option of

1. Section 541: Exclusion Provisions

Section 541 of the Code created a new procedure for determining the property of the bankruptcy estate. All property of the debtor is now immediately placed in the bankruptcy estate under control of the trustee.[50] This section significantly limits the dependence of the Bankruptcy Code on state and federal nonbankruptcy law.[51] Under section 541, the filing of a chapter 7 bankruptcy petition creates an estate comprised of "all legal and equitable interests of the debtor in property as of the commencement of the case."[52] The legislative history of section 541 indicates Congress' intent that the bankruptcy estate be all-inclusive.[53]

Paragraph c of section 541 is illustrative of that section's broad coverage. Paragraph c provides that restrictions on the transfer of the debtor's interest in property will not preclude it from being included in the estate.[54] Subparagraph 2, on the other hand, provides that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."[55]

Under the broad definition of section 541(a)(1), even spendthrift trusts,[56] which were excluded from the estate under the Bankruptcy Act,[57] would pass to the bankruptcy estate.[58] The legislative history

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> electing to take the federal exemptions provided under federal non-bankruptcy law and state law.

Id. at 604 n.1.

50. 11 U.S.C. § 541(a)(1).

51. *See* 4 COLLIER ON BANKRUPTCY, *supra* note 31, § 541.02[1].

52. 11 U.S.C. § 541(a)(1).

53. S. REP. No. 989, 95th Cong., 2d Sess. 82 (1978). The Senate Report states:

> The scope of this paragraph is broad. It includes all kinds of property, including tangible and intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act . . . .
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> . . . .
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> . . . [I]t includes as property of the estate all property of the debtor, even that needed for a fresh start.

Id.; *see* H.R. REP. No. 595, 95th Cong., 1st Sess. 367-69 (1978).

54. 11 U.S.C. § 541(c)(1)(A).

55. *Id.* § 541(c)(2).

56. A spendthrift trust is generally defined as a trust in which the interest of the beneficiary cannot be assigned or reached by creditors. The primary objective of such a trust, however, is to protect the beneficiary from his own folly, inefficiency, or misfortune. II A. SCOTT, THE LAW OF TRUSTS § 151, at 1131 (3d ed. 1967).

57. It was generally recognized that spendthrift trusts were exempt under § 70(a) because they were neither transferable nor leviable. *See, e.g.*, Stebbins v. Crocker Citizens Nat'l Bank (*In re* Ahlswede), 516 F.2d 784, 786 (9th Cir. 1975). Thus, regardless of state law or recognized exceptions to the contrary, the interest in spendthrift trusts would not pass to bankruptcy estates. First Northwestern Trust Co. v. IRS, 622 F.2d 387 (8th Cir. 1980). The problem is that there is a general conflict among states as to the validity of the spendthrift trusts themselves and as to what constitutes a spend-

of section 541(c)(2), however, indicates that Congress intended to preserve the status which spendthrift trusts enjoyed under the Bankruptcy Act.[59] In its analysis of section 541, the Senate Report states, "Paragraph (2) of subsection (c) preserves the restrictions on transfer of a spendthrift trust to the extent the restriction is enforceable under nonbankruptcy law."[60]

2. *Section 522: Exemption Provisions*

In addition to the exclusions established in section 541(c)(2), another Code section applicable to pension plans contains exemption provisions. Section 522[61] represents another significant change from the former Bankruptcy Act. Section 522 allows an individual debtor to choose between the exemptions permitted by the law of his or her state of domicile and by federal nonbankruptcy law, or the newly created exemptions established by the Bankruptcy Code.[62]

The debtor who chooses state and federal nonbankruptcy exemp-

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thrift trust. *See* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 40, at 151-54 (5th ed. 1973); II A. SCOTT, *supra* note 56, § 151.

58. In enacting the Bankruptcy Code, Congress was concerned about conditional transfers and their possible effect on the bankruptcy estate. For example, a transferor could condition his transfer such that if the transferee became involved in bankruptcy proceedings, title in the property would revert to the transferee. To resolve this problem, § 541 was enacted to include all property interests in the bankruptcy estate regardless of prior conditions. *See* B. WEINTRAUB & A. RESNICK, *supra* note 16, § 4.03[7]. The exception to this rule lies in § 541(c)(2).

59. *See* S. REP. No. 989, 95th Cong., 2d Sess. 83, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5869.

> Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. The provisions invalidated are those that restrict or condition transfer of the debtor's interest, and those that are conditioned on the insolvency or financial condition of the debtor, on the commencement of a bankruptcy case, or on the appointment of a custodian of the debtor's property. Paragraph (2) of subsection (c), however, preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents.

Id.

60. *Id.* This is precisely the status which spendthrift trusts had enjoyed under the Bankruptcy Act.

61. 11 U.S.C. § 522.

62. *Id.*, subd. (b). The insolvent debtor may choose between the federal exemptions of § 522 or a combination of state law or federal nonbankruptcy provisions. In Minnesota, for example, the bankrupt's choice under § 522 may be largely influenced by the amount of equity he or she has in his or her homestead. Because the state has a liberal homestead exemption, *see* MINN. STAT. ch. 510 (1984), the Minnesota debtor will choose the state and nonbankruptcy federal exemptions if he or she has substantial equity in his or her home. Pulles, *supra* note 3, at 24-25. For a more detailed examination of the § 522 provisions, see Donnelly, *The New (Proposed?) Bankruptcy Act: The Development of its Structural Provisions and Their Impact on the Interests of Consumer Debtors*, 18 SANTA CLARA L. REV. 291, 329-34 (1978).

tions is entitled to keep any property that is exempt under federal statutes other than the Bankruptcy Code.[63] The debtor may also keep any property that is exempt under state or local law in his or her place of domicile at the time of the petition.[64] Finally, the debtor may exempt an interest in property as a tenant by the entirety or as a joint tenant if he or she chooses this method.[65] In the alternative, the debtor may take advantage of the specific federal exemptions set out in the Bankruptcy Code.[66] In most instances, the Code exemp-

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63. 11 U.S.C. § 522(b)(2)(A). Exemptions under federal nonbankruptcy statutes are generally limited in scope. Most relate to monetary benefits and pensions. Exemptions include benefits paid under the Social Security Act, 42 U.S.C. § 407; the Veteran's Administration, 38 U.S.C. § 3101; and retirement benefits paid to employees of the United States Civil Service, 5 U.S.C. § 8346(a).

64. 11 U.S.C. § 522(b)(2)(A). State exemptions vary widely across the nation and from region to region due to a variety of historical and political factors. *See* B. WEINTRAUB & A. RESNICK, *supra* note 16, § 4.07[1][b]. The Minnesota exemption statute, for example, lists specific types of property not subject to attachment, garnishment, or sale. *See* MINN. STAT. § 550.37. These include: the family bible; a burial plot; basic personal items such as clothing and household items (but not exceeding a certain amount, adjusted biannually for inflation); farm equipment or other tools of trade or business not exceeding $5000; property used in education open to the public; money from damage claims on other exempt property; insurance proceeds for the death of a spouse not exceeding $20,000; benefit payments from police or firefighters' associations; a manufactured home; a motor vehicle not exceeding $2,000 in value; wages not subject to garnishment; relief or welfare payments; earnings of a minor child of the debtor; civil causes of action for injuries or death; and aggregate interest not exceeding $4000 in life insurance contracts. *Id.* Subdivision 24 sets out the exemption for pension plans:

> Subd. 24. *Employee Benefits.* The debtor's right to receive a payment, or payments received by the debtor, under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, *to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.*

Id. (emphasis added). Subdivision 24 is very similar to 11 U.S.C. § 522(d)(10)(E). *See infra* note 66 (text of § 522(d)(10)(E)).

65. 11 U.S.C. § 522(b)(2)(B).

66. *See Id.* § 522(d). These include: the debtor's aggregate interest in real property not exceeding $7500; interest in a motor vehicle not exceeding $1200; debtor's interest in personal and household items not exceeding $200; interest in tools of the debtor's trade or business not exceeding $700; an unmatured life insurance contract; professionally prescribed health aids; the debtor's right to receive payments for civil damages, life insurance proceeds, or awards under crime victims reparation laws. *Id.* The subsection applicable to pension plans, 11 U.S.C. § 522(d)(10)(E), reads:

(10) The Debtor's right to receive—

> . . . .
>
> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, *to the extent reasonably necessary for the support of the debtor and any dependent of the debtor,* unless—
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> (i) such plan or contract was established by or under the auspices of an

tions are more generous than those of the states,[67] and include those things necessary for the debtor's fresh start after bankruptcy.[68] Thus, the federal exemptions remain in harmony with the general policies of the bankruptcy laws.

II. IN RE *GRAHAM*

In In re *Graham,*[69] the debtor filed for bankruptcy under chapter 7. Graham, a physician, was the sole shareholder, director, and officer of a professional corporation. The corporation had previously formed a pension and profit-sharing trust under ERISA.[70] Graham was the trustee and primary beneficiary of that plan at the time he filed his petition.[71]

The trust qualified as tax exempt under the appropriate provisions of the Internal Revenue Code,[72] and received contributions from the corporation based on the net corporate profits of the previous fiscal year.[73] Graham's fully vested and accrued benefits under the plan were $150,000, attributable to corporate contributions made on his behalf.[74] A written plan governed the administration of the trust fund. The plan provided that benefits accruing pursuant to it could not be assigned or alienated by its beneficiary.[75]

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insider that employed the debtor at the time the debtor's rights under such contract arose;

(ii) such payment is on account of length of service; *and*

(iii) such plan or contract does not qualify [as an exempt pension, profit-sharing, stock bonus, or annuity plan under the Internal Revenue Code].

Id. (emphasis added). A debtor may not utilize the federal exemptions if his or her state of domicile has vetoed the debtor's option to choose federal exemptions in § 522(d). Thirty-seven states have enacted legislation prohibiting debtors from electing the federal exemptions provided by § 522(d). For a list of these states, see 3 COLLIER ON BANKRUPTCY, *supra* note 31, § 522.02, at 522-12 n.4a. For a more detailed discussion of the § 522 opt-out clause, see Haines, *Section 522's Opt-out Clause: Debtors' Bankruptcy Exemptions in a Sorry State,* 1983 ARIZ. ST. L.J. 1.

67. Although this is not always the case, it is generally true. For a detailed discussion of the eleven federal exemptions under § 522(d), see B. WEINTRAUB & A. RESNICK, *supra* note 16, § 4.07[2].

68. *See supra* note 64.

69. Samore v. Graham (*In re* Graham), 726 F.2d 1268 (8th Cir. 1984).

70. *Id.* at 1269.

71. Samore v. Graham (*In re* Graham), 24 Bankr. 304, 306 (Bankr. W.D. Iowa 1982). The only other employee, Ryan, retired before Graham filed for bankruptcy. The advisory committee for Graham's ERISA plan decided at that time to hold his benefits in trust until he reached age 65. 726 F.2d at 1270. Graham was the sole member of the committee. *Id.*

72. The retirement plan qualified as tax exempt under I.R.C. § 401(a). 726 F.2d at 1269.

73. 24 Bankr. at 307.

74. 726 F.2d at 1269.

75. 24 Bankr. at 307. This prohibition on assignment and alienation is required

Graham terminated his employment with the corporation on the same day that he filed his chapter 7 petition.[76] He subsequently resigned his positions as officer and director of the corporation. The bankruptcy trustee was elected sole director of the corporation.[77] The trustee then commenced an action against Graham in Graham's capacity as trustee of the corporation's ERISA plan. The trustee requested that the bankruptcy court order that the entire amount of the debtor's accrued benefits in the plan be turned over to the bankruptcy estate.[78] The bankruptcy court held Graham's interest in the funds nonexempt, and ordered him to turn the entire amount over to the bankruptcy trustee.[79]

On appeal, the Eighth Circuit Court of Appeals held that the bankrupt's vested interest in the benefits of the ERISA-qualified pension trust were not exempt from the bankruptcy estate.[80] The court also

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by ERISA, 29 U.S.C. § 1056(d), and the Internal Revenue Code, I.R.C. § 401(a), in order to qualify the pension plan as tax exempt. The written plan agreement provided that a participant's nonforfeitable accrued benefits would be distributed by one or more of three methods: as a life annuity income, as fixed period installments, or as a lump sum payment. In addition, the plan provided that distribution would begin not later than the 60th day after the close of the plan year in which the beneficiary reached age 65, or terminated services with the employer. 726 F.2d at 1269. If a participant in the plan terminated his employment with the corporation prior to reaching normal retirement age, it was within the sole discretion of the advisory committee whether to commence distribution of the benefits to the participant at the close of the plan year or to wait until he or she reached age 65. *Id.* Paragraph 5.03 of the written plan reads as follows:

> ¶ 5.03 TERMINATION OF SERVICE PRIOR TO NORMAL RETIREMENT AGE: Upon termination of a participant's employment prior to attaining Normal Retirement Age (for any reason other than death or disability), The Advisory Committee, in its sole discretion, may direct the Trustee to pay the Participant his nonforfeitable Accrued Benefit. The Advisory Committee must give its direction to the Trustee within ninety (90) days of the Participant's Termination of Employment . . . If the Advisory Committee does not give the Trustee a direction to distribute, the Trustee shall continue to hold the Participant's Accrued Benefit in trust until the close of the Plan Year in which the Participant attains Normal Retirement Age, at which time the Trustee shall commence distribution of the Participant's nonforfeitable Accrued Benefit.

24 Bankr. at 307. The written plan defined the advisory committee as the corporation's board of directors. Graham, as the sole director, thus constituted the advisory committee. Three days prior to the filing of Graham's bankruptcy petition, the discretionary distribution provision of ¶ 5.03 of the written plan was amended by a special meeting of the board of directors. This amendment provided that benefits under the plan were not payable to the participant unless he or she was either totally disabled or until he or she reached 65 years of age. 726 F.2d at 1269-70.

76. 726 F.2d at 1270.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1273-74. In analyzing the legislative intent, the court stated, "There is no indication whatever that Congress intended § 541(c)(2) to be a broad exclusion

determined that the plan should not be excluded from the bankruptcy estate under applicable federal nonbankruptcy law.[81]

The court reasoned that the change in the scope of a bankruptcy estate under the Bankruptcy Code, the legislative history of section 541(c)(2),[82] the exemption provisions of section 522(d),[83] and the preemption provisions of ERISA[84] indicated that Congress did not intend the provisions of section 541(c)(2) to include ERISA pension fund benefits.[85] The court ruled that Congress, in enacting section 541(c)(2), intended only to preserve the status held by spendthrift trusts[86] under the Bankruptcy Act.[87]

The *Graham* court also noted that pension benefits are specifically treated under the Bankruptcy Code's exemption provision.[88] Pension benefits are therefore intended and assumed to vest in the estate when the petition is filed.[89] Only to the extent they are needed for a fresh start may pension benefits be exempted out.[90] The court held, however, that the pension proceeds at issue were not "property that is exempt under federal law."[91]

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which would apply to keep all debtors' entire ERISA plan benefits out of the estate." *Id.* at 1272.

81. *Id.* at 1274.

82. *See id.* at 1272; 11 U.S.C. § 541(c)(2). The court stated, "The Senate Report . . . explained that § 541(c)(2) was intended to preserve restrictions on a transfer of spendthrift trusts to the extent such trusts were valid under state law." *Id.*

83. *See* 726 F.2d at 1273-74; 11 U.S.C. § 522(d). The court cited a list from the House and Senate Reports of property which might be exempted under § 522(d). *See infra* note 113. The court held that since the list did not specifically include ERISA benefits, those benefits were not subject to the § 522(d) exemption provisions. 726 F.2d at 1274.

84. *See* 726 F.2d at 1273; I.R.C. § 1056(d). The court cited 29 U.S.C. § 1144(d) and concluded that "while ERISA-required anti-alienation clauses may preempt state law and preclude the use of judgment enforcement devices provided thereunder, they do not preclude inclusion of pension benefits in a debtor's bankruptcy estate by operation of federal law." *Id.*

85. 726 F.2d at 1272-74.

86. *See supra* notes 56-58 and accompanying text.

87. 11 U.S.C. §§ 1-1255 (1976); *see supra* note 19 and accompanying text.

88. *See* 726 F.2d at 1272. The court stated that "pension benefits are specifically treated under the Code's *exemption* provision, clearly indicating that they were intended and assumed to be part of the estate." *Id.* (emphasis in original). The court was referring to the exemption for pension plans provided by 11 U.S.C. § 541(d)(10)(E).

89. *See* 726 F.2d at 1272-73. "The question of pension rights is dealt with as a matter of exemption. A debtor's interest in pension funds first comes into the bankruptcy estate. To the extent they are needed for a fresh start they may then be exempted out." *Id.; see* 11 U.S.C. § 541(a) (all property of the debtor vests immediately in the estate upon filing of the petition).

90. 726 F.2d at 1273.

91. *Id.* The court stated, "ERISA specifically provides that its provisions were not to affect the operation of other federal statutes: 'Nothing in this subchapter . . . shall be construed to modify, invalidate, impair or supersede any law of the United

The *Graham* court addressed two fundamental issues. First, the court considered whether Graham's beneficial interest in the ERISA pension fund was subject to a restriction on alienation enforceable under nonbankruptcy law.[92] Second, the court considered whether the pension plan's prohibition against assignment and alienation[93] made Graham's interest in the plan exempt under federal law and, therefore, exempt from the bankruptcy estate.[94]

In holding that section 541 encompasses only traditional spendthrift trusts and not ERISA-qualifed plans, the court did not construe section 541 on its face. Instead, the court deferred to the section's legislative history.[95] Graham argued that the plan's anti-alienation clause[96] was a restriction on the transfer of his interest which was enforceable against general creditors under nonbankruptcy law and, therefore, against the bankruptcy trustee.[97] The court, however, rejected this argument despite previous case law indicating that ERISA prohibited garnishment of benefits under a qualified plan by the general creditors of a plan beneficiary.[98]

The court held that the phrase "applicable nonbankruptcy law" in section 541(c)(2) was not clear on its face. Consequently, it looked to legislative history to interpret the statute's meaning.[99] The court,

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States . . . or any rule or regulation issued under law.' " *Id.* (quoting 29 U.S.C. § 1144(d)).

92. 726 F.2d at 1270. The language phrasing the issue is derived from 11 U.S.C. § 541(c)(2), which provides: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." *Id.*

93. Such provisions are required for tax exempt qualification under ERISA and the Internal Revenue Code. *See* 29 U.S.C. § 1056(a); I.R.C. § 401(a); *see also supra* note 3.

94. 726 F.2d at 1273. The court's reference was to 11 U.S.C. § 522(b)(2)(A), which provides:

> (b) Notwithstanding § 541 of this title, an individual debtor may exempt from property of the estate . . .
>
> . . . .
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition . . . .

Id.

95. *See* 726 F.2d at 1271-72.

96. 29 U.S.C. § 1056(d)(1) requires that an anti-alienation clause be contained in the pension plan in order for it to qualify for tax benefits.

97. 726 F.2d at 1271.

98. *See* General Motors Corp. v. Buha, 623 F.2d 455, 463 (6th Cir. 1980) (anti-alienation provisions of ERISA preclude garnishment of fund benefits by general commercial creditors of fund beneficiary); Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 520 (N.D. Tex. 1981) (ERISA precludes garnishment of plan benefits by commercial creditors).

99. Other courts have reached a different result on the issue of pension plan includability in fact situations very similar to that in *Graham. See, e.g., In re* Pruitt, 30 Bankr. 330, 331 (Bankr. D. Colo. 1983) ("the language of § 541(c)(2) is clear on its

however, found no indication that Congress intended section 541(c)(2) to exclude ERISA plan benefits from the estate since the House and Senate Reports on the section referred only to spendthrift trusts.[100]

Similarly, the court rationalized that since pension benefits are specifically mentioned under section 522,[101] they are clearly intended and assumed to be a part of the bankruptcy estate under section 541.[102] This fact, together with the recommendations which led up to the enactment of section 522,[103] led the court to conclude that the section 522(d)(10)(E) exemptions[104] included pension plans not qualified under ERISA.[105] The court held, however, that qualified plans would certainly be included since Congress would not have provided an exemption provision for ERISA benefits if those benefits were never intended to be a part of the estate in the first place.[106]

In addressing the exemption issue under section 522, the *Graham* court continued its analysis of the section 541 exclusion issue. The question was whether the debtor was entitled to an exemption under section 522(b)(2)(A) of the Code.[107] The debtor argued that because the plan prohibited alienation and assignment,[108] his interest in the plan was "property that is exempt under Federal law."[109] The court refined and restated this issue as whether the established ban against garnishment of ERISA-qualified plans[110] under nonban-

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face and does not limit itself to spendthrift trusts"); *see also* Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 24 Bankr. 927 (D. Kan. 1982) ("under the plain and simple language of § 541(c)(2), if the ERISA anti-alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee").

100. *See* 726 F.2d at 1272-74; *see also* H.R. REP. No. 595, 95th Cong., 1st Sess. 176 (1977); S. REP. No. 989, 95th Cong., 2d Sess. 83 (1978) (§ 541(c)(2) was intended to continue exclusion of spendthrift trusts to the extent they are protected from creditors under applicable state law).

101. *See* 11 U.S.C. § 522(d)(10)(E).

102. 726 F.2d at 1272.

103. Plumb, *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1, 59 (1975) (citing commission's note 8 to Proposed Bankruptcy Act § 4-503; S. REP. No. 552, 91st Cong., 1st Sess. 201, 207 (1969)).

104. *See supra* note 66.

105. 726 F.2d at 1272.

106. *Id.* at 1272-73.

107. *See id.* at 1273; 11 U.S.C. § 522(b)(2)(A). Section 522(b)(2)(A) allows the debtor who is using the state exemption system to also exempt any property which is exempt under federal law other than § 522(d).

108. *See supra* note 75.

109. *See* 11 U.S.C. § 522(b)(2)(A).

110. *See Buha*, 623 F.2d at 460-62 (anti-assignment and anti-alienation provisions of ERISA plans must be read as including all encroachments both voluntary and involuntary and, therefore, plan benefits cannot be garnished by a creditor of a plan beneficiary); *Commercial Mortgage*, 526 F. Supp. at 516-18 (ERISA's assignment-alienation prohibition extends to involuntary assignments such as garnishments and cre-

kruptcy law constituted an exemption under section 522(b)(2)(A).[111]

To resolve the issue, the court again examined the Code's legislative history, which provided a list of property Congress intended to exempt under section 522(b)(2)(A).[112] The court recognized that the lists in the House and Senate Reports[113] were not exclusive, but reasoned that the failure of Congress to include ERISA in this list indicated that ERISA benefits are not exempt under section 522(b)(2)(A).[114]

The court found a conceptual distinction between property considered exempt in the legislative history and that in an ERISA plan.[115] The conceptual distinction was evidenced by the fact that all of the listed pension plans[116] were federal in nature,[117] while ERISA regulates only private employer pension plans.[118] The court therefore held that ERISA was not federal law within the context of sec-

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ates a general federal exemption of pension benefits from claims of commercial creditors). The *Graham* court ruled that the *Buha/Commercial Mortgage* bar on garnishment of ERISA plan benefits is not applicable in bankruptcy cases. *See* 726 F.2d at 1274.

111. The court stated, "The question before us is whether . . . [the *Buha/Commercial Mortgage*] bar constitutes a § 522(b)(2)(A) federal exemption in a bankruptcy proceeding." 726 F.2d at 1273.

112. *See id.* at 1273-74.

113. *Id.* at 1274. The court cited S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978) and H.R. Rep. No. 595, 95th Cong., 2d Sess. 360 (1977), which state that the nonexclusive list of exemptions includes: Foreign Service Retirement and Disability payments, Social Security payments, injury or death compensation payments from war risk hazards, wages of fishermen, seamen, and apprentices, civil service retirement benefits, longshoremen's and harbor workers' benefits, Railroad Retirement Act annuities and pensions, veterans' benefits, special pensions paid to the winners of the Congressional Medal of Honor, and federal homestead lands on debts contracted before issuance of the patent. 726 F.2d at 1274. The court also stated, "The legislative history provides no further indication of the intended scope of this provision." *Id.*

114. The court declared, "While the above list was not meant to be exclusive, we find the failure of Congress to include ERISA plan benefits probative of Congressional intent that ERISA was not a 'Federal law' upon which a § 522(b)(2)(A) exemption could be based." 726 F.2d at 1274.

115. The court acknowledged the similarity between ERISA and the other federal pension plans, stating that "although the provisions of some of the statutes on the list creating a federal exemption are similar to the anti-alienation provision of ERISA, there is a conceptual distinction between the property exempted by the listed laws and the property covered by ERISA." *Id.*

116. This reference was to those plans and benefits which, according to the congressional reports, are specifically exempted under federal law.

117. The court stated, "The pensions, wages, benefits, and payments included in the illustrative list are all peculiarly federal in nature, created by federal law or related to industries traditionally protected by the federal government." 726 F.2d at 1274.

118. *Id.*

tion 522(b)(2)(A).[119]

III. ERISA Plans After *Graham*

The *Graham* court retreated to the legislative histories of the relevant statutes to hold that the beneficial interest in the ERISA plan should be neither excluded nor exempt from the bankruptcy estate.[120] In so holding, however, the court may have "done an injustice to the plain meaning of the statute[s] and to the congressional intent behind ERISA."[121]

The problem in ERISA plan bankruptcy cases arises when, as in *Graham,* the pension plan does not constitute a valid spendthrift trust under traditional state law.[122] The problem is exacerbated when the pension plan is self-settled[123] or easy access.[124] In *Graham,* the court found that the statutory language of the Bankruptcy Code was ambiguous.[125] Consequently, it relied on legislative history to determine that Congress intended to allow pension plans to be exempt only if the plan was a spendthrift trust under state law.[126] The difficulty with the court's analysis is that it is not clear that Congress actually intended ERISA plans to fall within the bankruptcy estate.[127]

Graham indicates the current trend in the law. The circuit courts of appeal, in the wake of the all-inclusive language of the Bankruptcy Code, have disallowed pension plan exemptions or exclusions under the Code.[128] Other federal courts have also disallowed such exemp-

119. *See id.* The court concluded "that Congress did not intend to include ERISA plans within the other 'Federal law' exemption of § 522." *Id.*

120. *See id.* at 1271-74.

121. Pulles, *supra* note 3, at 19; *see supra* note 12.

122. *See supra* notes 56-57.

123. Pulles, *supra* note 3, at 19. The term "self-settled" includes Keoghs, IRA plans, and other systems in which the creator or settlor of the trust and the beneficiary are the same person.

124. *Id.* The term "easy access" refers to those trusts in which the beneficiary has the power or ability to make withdrawals before his or her normal retirement age. *Id.*

125. *See* 726 F.2d 1271.

126. *See Clotfelter,* 24 Bankr. at 929 (term "spendthrift" as used in the legislative reports should not be construed as a precise term of art, but rather as a more general term which includes all similar plans and trusts).

127. *See infra* notes 148-49.

128. *See, e.g., In re* Lichstrahl, 750 F.2d 1488 (11th Cir. 1985) (ERISA-qualified plans which were not spendthrift trusts under state law were not exempt under federal law, and thus passed to the bankruptcy estate); *In re* Kochell, 732 F.2d 564 (Bankr. 7th Cir. 1984) (funds in pension plan offered by clinic which employed debtor were not exempt, but were included in the bankruptcy estate); Clark v. O'Neill (*In re* Clark), 711 F.2d 21 (3rd Cir. 1983) (payments to debtor from Keogh account not entitled to exemption since underlying purpose of the statute is to alleviate present rather than long-term need); *Goff,* 706 F.2d 574 (5th Cir. 1983) (where ERISA-qualified trusts were not spendthrift trusts they were not exempt); Regan v. Ross, 691 F.2d 81 (2d Cir. 1982) (providing that restriction on transfer of a beneficial interest

tions and exclusions.[129] Only a minority of courts have held to the contrary.[130]

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of debtor in a trust that is enforceable under applicable nonbankruptcy law was inapplicable notwithstanding state anti-assignment provision); Ryerson v. Ryerson (*In re* Ryerson), 30 Bankr. 541 (Bankr. 9th Cir. 1983) (debtor's termination payment sufficiently rooted in prebankruptcy past and so little entangled in his ability to make a fresh start that it was included in the estate).

129. *See, e.g.*, Miller v. Jones (*In re* Jones), 43 Bankr. 1002, 1005-06 (N.D. Ind. 1984) (ERISA plan held not to be a spendthrift trust and thus included in the bankruptcy estate); Central States, S.E. & S.W. Areas Health & Welfare Pension Fund v. Stephenson (*In re* McLean), 41 Bankr. 893 (D.S.C. 1984) (despite anti-alienation clauses, ERISA plan was not a spendthrift trust and was included in bankruptcy estate); Hovis v. Wright (*In re* Wright), 39 Bankr. 623 (D.S.C. 1983) (debtor's contributions to state retirement system were property of the estate under the Bankruptcy Code); Rodgers v. Norman (*In re* Crenshaw), 44 Bankr. 30 (Bankr. N.D. Ala. 1984) (debtor's vested interest in ERISA-qualified profit-sharing plan was property of the estate); Miller v. Lincoln Nat'l Bank & Trust (*In re* Cook), 43 Bankr. 996 (Bankr. N.D. Ind. 1984) (debtor's interest in qualified pension plan was included in bankruptcy estate despite anti-alienation clauses in the plan); Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 Bankr. 772 (Bankr. M.D. Fla. 1984) (ERISA-qualified plan was held to be a part of the bankruptcy estate); *In re* Berndt, 34 Bankr. 515 (Bankr. N.D. Ind. 1983) (savings portion of ERISA plan not excluded from bankruptcy estate where debtor had the present right to reach it at any time); *In re* Werner, 31 Bankr. 418 (Bankr. D. Minn. 1983) (interest in teacher's retirement savings account neither exempt nor excluded under the bankruptcy laws); *In re* Kelley, 31 Bankr. 786 (Bankr. N.D. Ohio 1983) (vested interest in a profit-sharing plan included despite spendthrift trust language contained in the plan); Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916 (Bankr. N.D. Ill. 1983) (corpus of ERISA plan not a spendthrift trust where debtor could reach it at any time); Bass v. Shackelford (*In re* Shackelford), 27 Bankr. 372 (Bankr. W.D. Va. 1983) (funds deposited by debtor in individual retirement account not excluded); *In re* Strasma, 26 Bankr. 449 (Bankr. W.D. Wisc. 1983) (restrictions on transfer of Keogh plan not enforceable in bankruptcy proceeding); Hovis v. Lowe (*In re* Lowe), 25 Bankr. 86 (Bankr. D.S.C. 1982) (IRA included in bankruptcy estate); *In re* Ross, 18 Bankr. 364 (Bankr. N.D.N.Y. 1982) (state law limiting ability of debtor to assign assets of pension fund does not preclude its inclusion in the bankruptcy estate); *In re* Iler, 18 Bankr. 855 (Bankr. D. Tenn. 1982) (funds held by debtor's former employer pursuant to a deferred compensation plan were included in estate); *In re* Watson, 13 Bankr. 391 (Bankr. M.D. Fla. 1981) (debtor's interest in qualified pension plan not exempt); Warren v. Taff (*In re* Taff), 10 Bankr. 101 (Bankr. D. Conn. 1981) (where pension funds were not reasonably necessary for the support of the debtor they were included in estate).

130. *See Threewitt*, 24 Bankr. at 927 (debtor's beneficial interest in ERISA-qualified plan was excluded from the bankruptcy estate); Bezanson v. Maine Nat'l Bank (*In re* Kwaak), 42 Bankr. 599 (Bankr. D. Me. 1984) (pension plan analogous to spendthrift trust and thus excluded); Liscinski v. Mosley (*In re* Mosley), 42 Bankr. 181 (Bankr. D.N.J. 1984) (*Graham* overlooks strong principle of state law preemption evidenced by ERISA); Warren v. G.M. Scott & Sons (*In re* Phillips), 34 Bankr. 543 (Bankr. S.D. Ohio 1983) (interest in profit-sharing pension plan not included because plan contained anti-alienation language which precluded access by general creditors); Shults v. Rose's Stores, Inc. (*In re* Holt), 32 Bankr. 767 (Bankr. E.D. Tenn. 1983) (funds contributed toward debtor's pension fund excluded from the estate); *In re* Pruitt, 30 Bankr. 330 (Bankr. D. Colo. 1983) (debtor's interest in ERISA-qualified plan not property of estate); *In re* Rogers, 24 Bankr. 181 (Bankr. D. Ariz. 1982) (where debtor

The *Graham* court's holding that section 541(c)(2) allows ERISA benefits to be included in the bankruptcy estate is difficult to reconcile with the statutory language. The court held that Congress would not have provided an exemption under section 522(d)(10)(E)[131] if it had meant section 541[132] to exclude pension benefits.[133] Section 522(d)(10)(E), which exempts pension-type benefits from a wide range of sources,[134] is not inconsistent with section 541(c)(2), however. While the two statutes overlap, they are not inconsistent.[135]

The court also gave section 541(c)(2) an unnecessarily narrow constructon.[136] The language of section 541(c)(2) is clear and does not limit itself strictly to spendthrift trusts.[137] Congress did not

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could reach assets of ERISA-qualified plan only under certain conditions, none of which had been met at the time of filing, his interest was not included); *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981) (pension benefits paid to debtor in lump sum before filing of petition were reasonably necessary for the support of the debtor and not included in the bankruptcy estate).

131. *See* 11 U.S.C. § 522(d)(10)(E).

132. *Id.* § 541(c)(2).

133. 726 F.2d at 1272. For a discussion of the court's reasoning, see *supra* notes 101-06 and accompanying text.

134. *See Threewitt,* 24 Bankr. at 930. The district court in *Threewitt* stated that:

> Section 522(d)(10)(E) exempts the right to receive payments necessary for support from a wide range of sources, *tax qualified or not,* including, for example, Christmas stock bonuses paid upon 25 years of service, or profit-sharing plans restricted to senior employees, or an annuity purchased to provide income to a worker disabled in an industrial accident.

Id. (emphasis in original) (footnote omitted).

135. *See Pruitt,* 30 Bankr. 331-32. The *Pruitt* court held that:

> 11 U.S.C. § 522(d)(10)(E) is not inconsistent with Section 541(c)(2). . . . Section 522(d)(10)(E) exempts ERISA plans as well as many other types of support payments. As stated by the court in *In re Threewitt* . . . there may be an overlap between 541(c)(2) and 522(d)(10)(E) in that the former excludes ERISA plans from property of the estate and the latter provides an exemption for them but that overlap does not constitute an inconsistency.

Id. The *Threewitt* court summed up its discussion of the overlap of the two sections by succinctly proclaiming that it did "not consider it remarkable that Congress did not bother to further complicate an already complex code by taking pains to insure that there was no overlap between Section 522(d)(10)(E) and Section 541(c)(2)." *Threewitt,* 24 Bankr. at 930.

136. Section 541(c)(2) seems clear on its face. Both the *Pruitt* and *Threewitt* courts concluded that it is. *See Pruitt,* 30 Bankr. at 331; *Threewitt,* 24 Bankr. at 929; *see also* Pulles, *supra* note 3, at 19. One would think that the application of this section to a plan involving ERISA-qualifying anti-alienation provisions would be a simple task. *Id.* The question would be: outside of bankruptcy, would a court give legal effect to the anti-alienation clause of the plan? If the answer were yes, the fund would not be part of the bankruptcy estate under § 541(c)(2). Pulles, *supra* note 3, at 19.

137. *See* 11 U.S.C. § 541(c)(2) (an interest of the debtor in property becomes property of the estate, but a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title"). In *Pruitt,* the court asserted, "The language of Section 541(c)(2) is clear on its face and does not limit itself to spendthrift trusts. When a statute is clear on its face there is no need to resort to legislative history." 30 Bankr.

choose to use the term "spendthrift trust" in the language of the statute itself.[138] It is unreasonable to conclude, therefore, that the term, as used in the legislative history, should be interpreted as a term of art.[139] It is more logical that the term "spendthrift trust" should be given its more ordinary and general meaning.[140]

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at 331; *see* United States v. Oregon, 366 U.S. 643, 648 (1961); Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963, 966 (9th Cir. 1984) (statute should be interpreted to foster the purpose of the legislation and should not be extended to cover matters not specifically covered). One court has held that the bankruptcy laws are to be liberally construed in favor of bankrupt parties. *See* Spies v. Sytsma, 56 F.2d 520, 522 (8th Cir. 1932) (bankruptcy statutes should be liberally construed in the debtor's favor). Although *Spies* was decided under the Bankruptcy Act, prior precedents remain influential under the Code. *See supra* note 19.

138. *See* 11 U.S.C. § 541(c)(2). The only mention of spendthrift trusts was in the House and Senate Reports, *see supra* note 100, and also in the Bankruptcy Commission Report to Congress. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93-137, 93rd Cong., 1st Sess., pt. I, at 193 (1973). The commission was established in 1970 to study the bankruptcy laws and make recommendations to Congress. The report was given in two parts. Part I contains the recommendations of the commission on improving the bankruptcy laws of the United States, while part II consists of this proposed statute and explanatory notes. *Id.* at I-1. Interestingly enough, the commission's proposal for what was to become § 541(c)(2) did not contain the term spendthrift trust. That proposal read as follows:

> (b) *Invalidity of Certain Restrictions and Forefeitures* [sic]. Any prohibition on the transfer of property by the debtor and any provision for forfeiture or termination condition on the filing of a petition are unenforceable as to property of the estate, but a restriction on the transfer of a beneficial interest of the debtor in a trust created for his support which is enforceable under applicable nonbankruptcy law shall be enforceable against the trustee only to the extent of the income reasonably necessary for the support of the debtor and his dependents.

Id. pt. II, at 147-48. The commission made reference to spendthrift trusts only in its recommendations and in the comments to the proposed statute. The recommendations stated that "the Commission recommends that any prohibition on the transfer of property by the debtor and any provision for forfeiture or termination as a result of the filing of a petition be unenforceable as to property of the estate, *except as qualified in the case of spendthrift trusts*." *Id.* pt. I, at 193 (emphasis added). The comment to proposed § 541(c)(2), however, states, "[proposed § 541(c)(2)] creates an exception as to spendthrift *and support trusts. The beneficial interest of the debtor in income and principal needed to support the debtor and his dependents is not available for creditors*." *Id.* pt. II, at 151 (emphasis added). It cannot, therefore, be categorically stated that the commission, and subsequently Congress, intended § 541(c)(2) to include only spendthrift trusts.

139. *See Threewitt*, 24 Bankr. at 929.

140. The *Threewitt* court declared that:

> Since Congress did not choose to use the term 'spendthrift trust' in the language of the section itself, there is no reason to suppose that when the term appears in the legislative history it should be taken as a term of art; it is more reasonable to suppose that the term should be given its ordinary, more general meaning as 'inclusive of all trusts which bar creditors from reaching a beneficiary's interest.'

Id. (citing 76 AM. JUR. 2D *Trusts* § 148, at 389 (1975)); *cf.* Millhouse v. Swan Lumber Co. (*In re* Sims Bros. Builders, Inc.), 35 Bankr. 149, 151 (Bankr. S.D. Ohio 1983)

The important issue is not whether the pension plan has the characteristics of a traditional spendthrift trust, but whether the debtor's interest in it would be protected against general creditors.[141] This conclusion is supported by the weight of authority holding that ERISA assets cannot be reached by ordinary creditors.[142] If the anti-alienation and assignment provisions of a pension plan are enforceable against creditors, the plain language of section 541(c)(2) dictates that they are also enforceable against the bankruptcy trustee.[143]

The *Graham* court also failed to address a question which bankruptcy courts have addressed in dealing with the exemption issue.[144] The Eighth Circuit assumed that ERISA creates a bar to garnishment

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(fundamental canon of statutory construction is that words are to be given their ordinary, commonly understood meaning); Noggle v. Beneficial Fin. Co. (*In re* Noggle), 30 Bankr. 303 (Bankr. E.D. Mich. 1983) (a fundamental canon of statutory construction is that unless otherwise defined, words should be given their ordinary meaning).

141. *Threewitt*, 24 Bankr. at 929; *see Pruitt*, 30 Bankr. 331; Pulles, *supra* note 3, at 19.

142. *See Threewitt*, 24 Bankr. at 929; *see also* General Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980) (pension plans not subject to garnishment); Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510 (N.D. Tex. 1981) ("ERISA's assignment-alienation prohibition creates a general federal exemption of pension benefits from commercial creditors' claims and preempts otherwise relevant state law"); *cf.* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 679 F.2d 1307, 1309 (9th Cir. 1982) (ERISA anti-alientation provisions extended to vacation trusts).

143. *See Threewitt*, 24 Bankr. at 929. The *Threewitt* court held that since the ERISA plan was beyond the reach of general creditors, "it accordingly follows, by virtue of Section 541(c)(2), that the bankruptcy trustee may not reach [the debtor's] interest in the [ERISA] plan." *Id.*; *cf. Mosley*, 42 Bankr. at 190-91. In *Mosley*, the court disagreed with the conclusion of *Commercial Mortgage* that the anti-alienation provision of ERISA creates a per se exemption for every qualified pension plan. Nevertheless, the court determined that the ERISA-qualified plan involved in that case was exempt from general creditors and was therefore excluded by virtue of the "applicable nonbankruptcy law" language of § 541(c)(2). *Id.*

144. One court has stated the issue as "whether [29 U.S.C. § 1056(d)] was meant to create a federal exemption for all pension plans governed by ERISA." *Mosley*, 42 Bankr. at 188. Section 1056(d) merely requires that the pension plan must state that the benefits stemming from it may not be assigned or alienated. 29 U.S.C. § 1056(d); *see* I.R.C. § 401(a)(13) (trust qualified only if plan provides that benefits may not be assigned or alienated). These statutes require only that the language be contained in the plan for qualification under ERISA. This has led to a division in the courts as to whether ERISA actually creates a federal exemption or merely requires the anti-alienation language and leaves the question of plan exemption up to state law. *See Mosley*, 42 Bankr. at 188-89; *see also* Comment, *Attachment of Pension Benefits Under ERISA*, 74 Nw. U.L. REV. 255 (1979). The bankruptcy court in *Graham* addressed this argument and explained:

> In [5 U.S.C. § 8346] Congress directly exempted the Civil Service Benefits from creditors. In contrast, ERISA only requires that the plan contain a restriction on alienation and assignment in order to qualify for ERISA tax benefits. That requirement is not an exemption from creditors' process provided by federal law. If Congress has intended that ERISA would provide such an exemption, a provision similar to [5 U.S.C. § 8346] could have been enacted. The fact that they did not do so leads this Court to conclude that

of qualified plan benefits by general creditors of a beneficiary.[145] The bankruptcy court, however, held that since ERISA does not specifically preclude garnishment creditors,[146] it does not create an exemption from creditors' process provided by federal law.[147] Both the analysis by the bankruptcy court and the subsequent summary affirmation of this point by the Eighth Circuit overlook the policy behind ERISA.[148] ERISA was intended to make pension regulation more uniform by removing state regulatory power and establishing ERISA fund regulation as a strictly federal concern.[149] It is illogical to assume that Congress, in enacting the Bankruptcy Code, intended

> an ERISA fund is not within the exemption from the bankruptcy estate provided by other federal law under § 522(b)(2)(A).

24 Bankr. at 312.

145. *See* 726 F.2d at 1273; *see also Mosley*, 42 Bankr. at 188. The *Mosley* court noted that "although the Bankruptcy Court opinion in *In re Graham* was affirmed, the Court of Appeals assumed without analysis that ERISA section 206(d) and I.R.C. section 401(a)(13) 'create a bar to garnishment of qualified plan benefits by general commercial creditors of a beneficiary . . . .' " *Id.* at 188-89.

146. The provisions of ERISA require only that the pension plans provide for the anti-alienation and assignment language itself, not that the plan be specifically unalienable and unassignable under federal law.

147. *See* 24 Bankr. at 312.

148. *See In re* Mosley, 42 Bankr. at 189. The *Mosley* court held:

> If Congress had intended to subject all pensions to the various exemption provisions of the states in spite of the clear preemption provisions providing that ERISA 'supersede(s) any and all State laws insofar as they may not or hereafter relate to' pensions, the statute would surely have done so explicitly. Indeed, ERISA does explicitly preserve state regulation of 'insurance, banking or securities,' 29 U.S.C. Section 1144(b)(2)(A), and 'generally applicable criminal law(s) of a state,' Section 1144(b)(2)(B)(4), but does not mention either exemption or attachment laws of the states. The anti-alienation provision of ERISA was thus intended to create a federal exemption for pensions.

Id. at 189; *see also* text accompanying note 121, *supra.*

149. Subchapter I of ERISA provides that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that is ERISA-qualified. 29 U.S.C. § 1144(a). That same statute provides, however, that no part of ERISA should be construed as superseding or amending any law of the United States. 11 U.S.C. § 1144(d). Applicable federal law, not state nonbankruptcy law, controls whether the restrictions in the plans are applicable. Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977); *see Holt*, 32 Bankr. at 770. Senator Williams, a member of the Senate committee responsible for the ERISA legislation, stated that it was intended that a body of federal common law be developed to determine the rights and obligations stemming from ERISA private pension plans. *See* 120 CONG. REC. 29,942 (1974) (remarks of Sen. Williams). The court stated that the House Ways and Means Committee Report supports the conclusion that general creditors should not be able to reach ERISA pension assets. 32 Bankr. at 771-72. The Committee Report states: "*Alienation.*—To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated." H.R. REP. No. 807, 93rd Cong., 2d Sess. 68 (1974).

to resume reliance on state law[150] when one of the main policy objectives behind ERISA and the Bankruptcy Code was to avoid reliance on state statutes.[151]

The court's determination that ERISA was not another applicable federal law[152] for the purposes of section 522(b)(2)(A) is also not well-reasoned. The legislative history clearly indicates that the list of possible exemptions under federal law is not meant to be exclusive.[153] The court specifically noted that no further indications of legislative intent were given other than the non-exclusive list mentioned by Congress.[154] A more careful analysis, however, reveals other indications of legislative intent in the House and Senate Reports.[155] It is questionable whether Congress intended to exclude ERISA pension plans entirely from section 522(b)(2)(A)[156] or simply intended to allow the trustee to receive the excess over that which is reasonably necessary for the support of the debtor and his dependents.[157]

The court's conceptual distinction between the listed congres-

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150. For example, it is illogical to assume that Congress intended to use state spendthrift trust law to determine whether the pension plan passes to the estate. *See, e.g.*, Miller v. Jones (*In re* Jones), 43 Bankr. 1002 (N.D. Ind. 1984) (ERISA plan assets did pass to the bankruptcy estate because plan did not qualify as spendthrift trust under state law).

151. As described in *Mosley*, the ERISA legislation was intended to do away with all reliance on state regulation of qualified private pension plans. The enactment of the new method of determining the property of the estate in § 541 was intended to reduce the reliance of bankruptcy law on state law. *See In re* Wildman, 30 Bankr. 133 (Bankr. N.D. Ill. 1983) (one of the dominant purposes behind the Bankruptcy Reform Act of 1978 was to place within a single court the authority to determine all aspects of a bankruptcy case).

152. 726 F.2d at 1274.

153. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 360 (1978) (debtor may choose between federal exemptions or exemptions provided under other federal law or the law of his or her domicile state).

154. *See* 726 F.2d at 1274. The court stated, "The legislative history provides no further indication of the intended scope of this provision." *Id.*

155. The notes to the proposed statute made by the Commission on Bankruptcy Laws state:

> The value of property exempted by [§ 522(b)(2)(A)] is not limited. Benefits or rights under a retirement plan are exempt under [§ 522(b)(2)(A)] if the plan is qualified under I.R.C. § 401(a). A limit is placed on the exemption since it is recognized that members of professional corporations and officers will have very substantial benefits. The exemption is limited to benefits 'reasonably necessary for the support of the debtor and his dependents.' This treatment is similar to that accorded interests in spendthrift trusts by [§ 541] of the proposed Act.

COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT H.R. DOC. No. 93-137, 93rd Cong., 1st Sess., pt. II, at 129 (1973).

156. The *Graham* court held that ERISA was not appropriate for a § 522(b)(2)(A) exemption. *See* 726 F.2d at 1274.

157. *See, e.g.*, *Goff*, 706 F.2d 574.

sional exemptions and ERISA is tenuous.[158] The court should have examined the intent behind the federal pension plans listed by Congress in determing whether ERISA was conceptually distinguishable. All the listed plans are "peculiarly federal in nature," as the court indicated.[159] The plans themselves, however, are meant to provide the same type of old age security as ERISA. ERISA does "regulate private employer pension systems" as *Graham* suggests.[160] But, the conceptual difference between pension provisions which support federal workers or workers in federally protected industries,[161] and provisions which were enacted to ensure that workers in private industry have pension plans is difficult to understand in light of the policies behind ERISA.[162]

CONCLUSION

The *Graham* court was concerned with the potential abuse of ERISA pension plans[163] and the bankruptcy statutes.[164] While the court may limit the scope of *Graham* to similar fact situations involving self-settled, easy-access funds, its holding may have done an injustice to the plain meaning of the statute and the policies behind ERISA and the bankruptcy laws.[165]

Congress has concluded through the enactment of ERISA that these types of pension plans are an asset to society.[166] It has also established, through the use of restrictive language, that ERISA regulates private pension plans.[167] Under *Graham,* however, when a debtor with an ERISA plan files for bankruptcy, the Bankruptcy Code and not ERISA becomes the controlling statute.[168]

The result in *Graham* may not have been inequitable based upon the facts of the case. The court's ruling could, however, inspire inequitable holdings when other courts follow its precedent. Other courts have resolved the issues presented here in a much more equi-

158. *See* 726 F.2d at 1274.

159. *Id.*

160. *Id.* The court concluded that Congress did not intend to include ERISA plans within the other federal law exemption of § 522. *Id.*

161. The reference is to the exempt interests cited in the legislative reports. *See supra* note 63.

162. *See supra* notes 149-51.

163. *See* Pulles, *supra* note 3, at 22.

164. *See supra* note 58 (referring to Congress' concern over conditional transfers).

165. Pulles, *supra* note 3, at 19.

166. By establishing the tax advantages for ERISA-qualified plans, Congress has indicated that it wants to encourage participation in these plans and that they are advantageous to our society and economy. *See supra* note 5.

167. *See* Pulles, *supra* note 3, at 24.

168. *See id.* (court's interpretation of bankruptcy law as controlling over ERISA makes Bankruptcy Code controlling statute for private pension plans rather than ERISA).

table manner.[169] The Eighth Circuit, even if it was not disposed to hold in favor of this particular debtor, should have indicated that its decision was limited to the specific facts of the case.

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169. *See supra* note 130 and accompanying text (cases excluding pension benefits from estate).